

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

JOSE FUENTES,	:	
	:	
Petitioner,	:	Civ. No. 16-1163 (RBK)
	:	
v.	:	
	:	
WARDEN MARK A. KIRBY,	:	OPINION
	:	
Respondent.	:	
	:	

ROBERT B. KUGLER, U.S.D.J.

I. INTRODUCTION

Petitioner is a federal prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Petitioner argues in his habeas petition that he is factually innocent of a sentencing enhancement because the government did not show that had three previous felonies to classify him as an armed career criminal. For the following reasons, the habeas petition will be summarily dismissed.

II. BACKGROUND

After pleading guilty in the United States District Court for the Eastern District of Virginia in 2003, petitioner was sentenced to 195 months imprisonment for conspiracy to possess with intent to distribute cocaine hydrochloride and possession of a firearm by a convicted felon. He was sentenced as an armed career criminal. Petitioner filed a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 which was denied by the Eastern District of Virginia in 2005. The United States Court of Appeals for the Fourth Circuit denied a certificate of appealability on that § 2255 motion on November 29, 2005. *See United States v. Fuentes*, 155 F. App'x 687 (4th Cir. 2005).

In March, 2016, petitioner filed the instant habeas petition in this Court pursuant to 28 U.S.C. § 2241. He claims that he is factually innocent of being considered an armed career criminal such that he was improperly sentenced.

In June, 2016, petitioner was granted authorization from the Fourth Circuit to file a second or successive § 2255 motion because he had made a *prima facie* showing that the new rule of constitutional law announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015) may apply to his case. (See E.D. Va. Crim. No. 03-0114 Dkt. No. 84) Petitioner is now proceeding with another § 2255 motion in the Eastern District of Virginia pursuant to this authorization from the Fourth Circuit. On July 29, 2016, the Eastern District of Virginia ordered the government to respond to petitioner's § 2255 motion filed in that court. In that action, petitioner argues that he was improperly sentenced as an armed career criminal pursuant to the United States Supreme Court decision in *Johnson*.

III. STANDARD FOR SUA SPONTE SCREENING OF HABEAS PETITION

With respect to screening the instant habeas petition, 28 U.S.C. § 2243 provides in relevant part:

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

As petitioner is proceeding *pro se*, his petition is held to less stringent standards than those pleadings drafted by lawyers. See *Rainey v. Varner*, 603 F.3d 189, 198 (3d Cir. 2010) (“It is the policy of the courts to give a liberal construction to pro se habeas petitions.”) (internal quotation marks and citation omitted); *United States v. Otero*, 502 F.3d 331, 334 (3d Cir. 2007) (“we construe pro se pleadings liberally.”) (citing *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594,

30 L.Ed.2d 652 (1972)). Nevertheless, “a district court is authorized to dismiss a [habeas] petition summarily when it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court[.]” *Lonchar v. Thomas*, 517 U.S. 314, 320 (1996).

IV. DISCUSSION

Petitioner seeks to have this Court review the criminal judgment and sentence entered by the Eastern District of Virginia in this § 2241 habeas petition. Generally, a challenge to the validity of a federal conviction or sentence must be brought under 28 U.S.C. § 2255. *See Jackman v. Shartle*, 535 F. App'x 87, 88 (3d Cir. 2013) (per curiam) (citing *Okereke v. United States*, 307 F.3d 117, 120 (3d Cir. 2002)). This is generally true because § 2255 prohibits a district court from entertaining a challenge to a prisoner's federal sentence through § 2241 unless the remedy under § 2255 is “inadequate or ineffective.” *See* 28 U.S.C. § 2255(e). Indeed, § 2255(e) states that:

[a]n application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such a court has denied him relief, unless it also appears that the remedy by the motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255(e). A § 2255 motion is “inadequate or ineffective,” which permits a petitioner to resort to a § 2241 petition, “only where the petitioner demonstrates that some limitation or procedure would prevent a § 2255 proceeding from affording him a full hearing and adjudication of his wrongful detention claim.” *Cradle v. U.S. ex rel. Miner*, 290 F.3d 536, 538 (3d Cir. 2002) (citations omitted). However, “[s]ection 2255 is not inadequate or ineffective merely because the sentencing court does not grant relief, the one-year statute of limitations has expired, or the

petitioner is unable to meet the stringent gatekeeping requirements of ... § 2255.” *Cradle*, 290 F.3d at 539 (citations omitted). “It is the inefficacy of the remedy, not the personal inability to use it, that is determinative.” *Id.* at 538 (citation omitted). “The provision exists to ensure that petitioners have a fair opportunity to seek collateral relief, not to enable them to evade procedural requirements.” *Id.* at 539 (citing *In re Dorsainvil*, 119 F.3d 245, 251-52 (3d Cir. 1997)).

In *Dorsainvil*, the Third Circuit held that the remedy provided by § 2255 is “inadequate or ineffective,” permitting resort to § 2241, where a prisoner who previously had filed a § 2255 motion on other grounds “had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate[.]” 119 F.3d at 251. Nevertheless, the Third Circuit emphasized that its holding was not suggesting that a § 2255 motion was “inadequate or ineffective” merely because a petitioner is unable to meet the strict gatekeeping requirements of § 2255. *See id.* The “safety valve,” as stated in *Dorsainvil*, is a narrow one and has been held to apply in situations where the prisoner has had no prior opportunity to challenge his conviction for a crime later deemed to be non-criminal by an intervening change in the law. *See Okereke*, 307 F.3d at 120 (citing *Dorsainvil*, 119 F.3d at 251).

Petitioner does not allege facts to bring him within the *Dorsainvil* exception. He does not allege that he had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate. Instead, his claims center around the purported impropriety of his sentence, not *the crimes* for which he was convicted. *See Scott v. Shartle*, 574 F. App'x 152, 155 (3d Cir. 2014) (per curiam) (“[B]ecause [petitioner] is challenging his career offender designation and is not claiming that he is now innocent of the predicate offense, he does not fall within the ‘safety valve’ exception created in *In re Dorsainvil*

and cannot proceed under § 2241.”) (citation omitted); *McIntosh v. Shartle*, 526 F. App'x 150, 152 (3d Cir. 2013) (per curiam) (“Here, McIntosh is challenging his designation as a career offender. Thus, he does not fall within the exception created in *Dorsainvil* and may not proceed under § 2241.”) (citation omitted); *Johnson v. Scism*, 454 F. App'x 87, 88 (3d Cir. 2012) (per curiam) (same); *United States v. Brown*, 456 F. App'x 79, 81 (3d Cir. 2012) (per curiam) (“We have held that § 2255's ‘safety valve’ applies only in rare circumstances, such as when an intervening change in the statute under which the petitioner was convicted renders the petitioner's conduct non-criminal. *Brown* has not satisfied that standard here, as he makes no allegation that he is actually innocent of the crime for which he was convicted, but instead asserts only that he is ‘innocent’ of being a career offender.”) (internal citation omitted); *Selby v. Scism*, 453 F. App'x 266, 268 (3d Cir. 2011) (per curiam) (“Selby does not argue that he is innocent of the offense for which he was convicted; he argues that he is “innocent” of a sentencing enhancement because of an intervening change in law. Accordingly, the exception described in *In re Dorsainvil* does not apply.”); *Arnold v. Hollingsworth*, No. 16-0993, 2016 WL 3647323, at *2 (D.N.J. July 7, 2016) (“[C]hallenges to career offender status may not be made under § 2241.”) Therefore, § 2241 is not the proper avenue for petitioner to pursue his claims.

Whenever a civil action is filed in a court that lacks jurisdiction, “the court shall, if it is in the interests of justice, transfer such action . . . to any other such court in which the action . . . could have been brought at the time it was filed.” 28 U.S.C. § 1631. In this case, this Court will not transfer this action to another court. Indeed, as described above, petitioner is proceeding with another § 2255 motion in the Eastern District of Virginia after receiving authorization from the Fourth Circuit that is challenging his armed career criminal status pursuant to the Supreme Court’s decision in *Johnson*.

V. CONCLUSION

For the foregoing reasons, the habeas petition will be summarily dismissed due to a lack of jurisdiction. An appropriate order will be entered.

DATED: August 24, 2016

s/Robert B. Kugler
ROBERT B. KUGLER
United States District Judge